

No. 25-7294

**In the United States Court of Appeals
for the Ninth Circuit**

BROOK LANG; CHRISTOPHER RABIN,
Plaintiffs-Appellants,

v.

PROVIDENCE HEALTH & SERVICES – WASHINGTON,
doing business as Providence Sacred Heart Medical Center,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Washington
Case No. 2:22-cv-00159-TOR (The Hon. Thomas O. Rice)

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INTRODUCTION

Dr. Brook Lang specializes in treating premature and high-risk newborns. For years, she worked in the Neonatal Intensive Care Unit at Providence Sacred Heart Medical Center, which provides the highest level of care to the sickest babies in the region. But, though she was good at her job, Dr. Lang was forced to quit. Ronald Ilg, her medical director and another Providence neonatologist, repeatedly sexually harassed and discriminated against her. He touched her without consent. He called her a “bad little girl[].” He said that some women just couldn’t be doctors and mothers. He said that if Dr. Lang was to discuss her career, she had to bring her husband.

And Dr. Lang was not alone. Over and over again, Providence staff complained that Ilg was demeaning; that he was abusive; that he harassed women. Dr. Lang herself reported Ilg’s misconduct. So too did her colleague, Dr. Christopher Rabin. In response, Ilg flew into a rage, threatening to harm Drs. Lang and Rabin. Yet Providence did nothing—nothing to stop the harassment, and nothing to protect its doctors from Ilg, known to carry a gun to work, threatening to harm them. So eventually, Dr. Lang, Dr. Rabin, and multiple other doctors were forced to quit.

Dr. Lang and Dr. Rabin sued Providence for wrongful discharge and for violation of the Washington Law Against Discrimination. But the district court granted summary judgment to Providence, holding that the hospital could not be

held responsible because, in the court's view, Providence was not the doctors' employer as a matter of law. Although at the motion to dismiss stage, this Court reversed the district court's order holding that Providence could not be the plaintiffs' employer, the court relied on almost identical reasoning to grant summary judgment. That reasoning is still wrong. And this Court should again reverse.

First, there is at least a material dispute of fact about whether Providence was the plaintiffs' employer under the common-law standard that Washington courts apply to wrongful discharge claims. Under that standard, the right to control an employee's work is the most important indicator of employment. Here, Providence had a right to control everything from what patients the plaintiffs could see, to what medications they could prescribe, to what tasks they had to perform. Providence trained its doctors. Its policies governed their work. And it supervised their performance. Providence had the right to investigate misconduct, discipline doctors who engaged in it, and ultimately, fire doctors from its NICU.

Despite all this, the district court seemed to believe that because Providence hired a staffing company to help it with human resources, Providence could not be the plaintiffs' employer. But joint employment is common. A reasonable juror could easily find that Providence employed its doctors, even if its staffing company could also be considered an employer.

Second, the plaintiffs' claims under the Washington Law Against Discrimination don't require an employment relationship at all. And even if they did, again, a jury could conclude that Providence counts. Indeed, as this Court explained in reversing the district court's earlier motion-to-dismiss order, where the Washington Law Against Discrimination requires an employment relationship, its definition of employer is broad. It applies to "any person acting in the interest of an employer, directly or indirectly." Wash. Rev. Code § 49.60.040(11). Providence had the right to control who worked in its NICU, what they did, and how they did it; it trained its doctors; it supervised them; and if necessary, it could fire them. At the very least, the hospital was acting "in the interest of an employer." Indeed, Washington courts have held that this definition is satisfied on far less.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because the plaintiffs asserted a claim under the Equal Pay Act, Dkt. 1 at 15–17, and it had supplemental jurisdiction over the plaintiffs' state-law claims under 28 U.S.C. § 1367. After the federal claims were resolved, the district court continued to exercise supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367. The district court granted Providence's motion for summary judgment and entered judgment against the plaintiffs on October 16, 2025. ER 30–31. The plaintiffs timely appealed on November 14, 2025. Dkt. 126 at 1. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Is there at least a material dispute of fact about whether Providence was the plaintiffs' employer for purposes of a wrongful discharge claim, where the hospital had the right to control their day-to-day work, supervise that work, review their performance, investigate misconduct, discipline the plaintiffs, and fire them?

2. Did the district court err in holding that the plaintiffs were required to prove an employment relationship with Providence to support their claims under the Washington Law Against Discrimination, when Washington courts hold that WLAD claims do not require an employment relationship?

3. If an employment relationship is required under the WLAD, did the district court err in holding that a reasonable juror could not conclude that Providence satisfies the statute's broad definition of an "employer" as anyone "acting in the interest of an employer," Wash. Rev. Code § 49.60.040(1)?

4. Did the district court err in concluding that a hostile work environment does not constitute an adverse employment action for purposes of a retaliation claim under Washington law, even though Washington courts have held otherwise?

5. Because this case involves entirely questions of Washington law, and the Washington Supreme Court has not yet had an opportunity to analyze joint employment for purposes of either a common-law wrongful discharge claim or

claims under the Washington Law Against Discrimination, should this Court certify to the Washington Supreme Court?

PERTINENT RULES AND STATUTES

The pertinent rules and statutory provisions are set forth in a statutory addendum to this brief. *See* 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

I. Factual background

1. Providence Sacred Heart Medical Center boasts that its Neonatal Intensive Care Unit provides “the highest level of care for high-risk babies” across the region. ER-249; *see* ER-36–37. And Providence relies on its “team of experienced” neonatologists to provide that care. ER-249; *see also Neonatal Intensive Care*, Providence Sacred Heart Children’s Hospital, <https://perma.cc/K3C2-Z4FY> (“Our neonatologists and other care providers specialize in treating our tiniest and sickest babies.”).¹

To staff its NICU, Providence worked with Mednax, a medical staffing company. ER-73–83. Although Mednax helped Providence staff its NICU and provided human resources support, Providence decided who worked at the hospital;

¹ Because this is an appeal from a grant of summary judgment to the defendant, the facts are presented in the light most favorable to the plaintiffs, the nonmoving party. *See Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 964 (9th Cir. 2002). Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

determined how its doctors should care for its patients; and supervised them to ensure they did so. ER-44-45, ER-51-52, ER-76, ER-156-61.

2. For years, the women who worked in Providence's NICU were discriminated against and sexually harassed by the Medical Director, Ronald Ilg. ER 172-76, ER-220, ER-224-25. Ilg routinely made "demeaning" comments. ER-224. He scheduled female doctors, but not male doctors, to work for weeks in a row, without a single day off. ER172-73, ER-204. And when they pushed back, Ilg said that some women couldn't handle being mothers and doctors. ER-202-03, ER-215. He criticized female doctors' judgment, even when they were right. ER-216-18, ER-225. Ilg complained that he "shouldn't have hired any women" at all. ER-214-15, ER-224. He called female doctors who challenged his discrimination "bad little girls" who needed to be "reprimand[ed]." ER-173-74. And when a female doctor complained, he said, "I need to ask your husband if you complain like this at home." ER-223.

Plaintiff Dr. Brook Lang was one of the Providence doctors targeted by Ilg. When Dr. Lang was simply trying to do her work, Ilg would harass her. For example, he "put his hand on [Dr. Lang's] leg," and commented, "[m]y wife just doesn't understand you and I." ER-175. He called Dr. Lang a "bad little girl[]" who "needed to behave." ER-174. When he wanted to discuss her career, Ilg told Dr. Lang that she had to bring her husband because he's the one who "had to make the decisions."

ER-176. And Ilg repeatedly interfered with Dr. Lang's treatment of Providence's patients, and then blamed her for his mistakes. ER-216–18.

When Dr. Lang told Ilg that she was “struggling” with the schedule—which, again, required women to work weeks on end without any days off—Ilg responded by telling her that if she wanted to see her young child, she should bring a picture to work. ER-172–73, ER-204. And when Lang raised a concern at a later meeting that “females were working more than men and not getting paid for it,” Ilg cut her off and said “some women just can't be mothers and doctors.” ER-202–03, ER-215. He threatened, “people who look at schedules can get fired.” ER-203.

3. Dr. Lang—and several other Providence staff members, including Plaintiff Dr. Christopher Rabin—repeatedly reported Ilg's behavior to Providence, both directly and through Mednax, its staffing company. ER-33, ER-177, ER-187, ER-193–94, ER-223–26, ER-228, ER-230–35, ER 238–40. When Ilg learned that the NICU staff had lodged complaints against him, he berated them—multiple times. ER-169–70, ER-186, ER-205–09, ER 236–37. “Anyone who threatens my job,” Ilg said, “threatens my livelihood. If you threaten my livelihood, you threaten my family, and any attack on my family I will take seriously and will do whatever I have to stop it, including causing harm.” ER-208. Ilg repeatedly threatened Dr. Lang and Dr. Rabin. ER 169–70, ER-205–06, ER-207–08, ER-236–37. Dr. Rabin worried that Ilg

might get “physical.” ER-237. And Ilg was known to carry a gun at the hospital. ER-33, ER-184.

Dr. Lang and Dr. Rabin and several others reported Ilg’s fits of rage and threats to the Chief Administrative Officer of Providence’s children’s hospital, which houses the NICU. ER-33, ER-170–71, ER-187–88, ER-210–12, ER-228. Yet Providence still refused to act. ER-33, ER-170–71, ER-212. Despite his sexual harassment—despite his threats to harm other Providence staff—the hospital allowed Ilg to continue working at the NICU. ER-171 (Chief Administrative Officer telling Dr. Lang to “[j]ust let it go”). Unable to safely continue working at Providence, Dr. Lang was “forced to quit.” ER-213. Two other female doctors also resigned, telling Providence “that they were leaving directly as a result of Dr. Ilg.” ER-63; *see* ER-63–64, ER-69, ER-222, ER-238–40. Still, Providence took no action. ER-64–65, ER-67 (Providence executive testifying Providence “do[es] not investigate resignations.”). Instead, it permitted Ilg to spread a rumor that “[t]hree of the doctors here left because they just couldn’t handle” being “women and mothers.” ER-215.

Eventually, a group of Providence officials—including Dr. Rabin—met to discuss Ilg’s “rage and anger.” ER-188–89. But the hospital shielded Ilg from potential discipline, subverting their typical process, by referring him to a program outside the hospital for doctors facing “health condition[s].” ER-49–50, ER-59, ER-61, ER-72, ER-196. Ilg went on leave, but he remained “in good standing at

Providence Sacred Heart and [his] membership and privileges [we]re unchanged.” ER-241. When Dr. Rabin heard that Ilg was about to return, Dr. Rabin was “afraid” for his safety and “sure” that Ilg would “retaliat[e]” as he had before. ER-182–83. Yet Providence still refused to put a “safety plan” in place; it refused to erect any “barriers” at all to Ilg engaging in precisely the same conduct that had caused so many other doctors to quit. ER-183, ER-195. Dr. Rabin felt he had no choice but to resign. ER-182–83.

After taking the leave Providence allowed him to take without consequence, Ilg tried to hire a hitman on the dark web to assault Dr. Lang. ER-243. Ilg sent the hitman Dr. Lang’s address and picture and instructed that Dr. Lang should be given “a significant beating that is obvious. It should injure both hands significantly or break the hands.” *Id.* Ilg paid the hitman more than \$2000 in Bitcoin. *Id.* He was ultimately convicted and sentenced to eight years in prison. ER-242.

It was only after Ilg’s conviction that Providence’s Chief Administrative Officer expressed remorse for not doing more to protect Dr. Lang. He apologized, writing: “I will need to do some deep soul searching on this. ... For what it is worth I am truly sorry I failed you.” ER-246.

4. Having been forced to quit because Providence failed to do anything about Ilg’s discrimination, harassment, and threats, Dr. Lang sued Providence for: (1) sex discrimination and retaliation under the Washington Law Against Discrimination;

and (2) wrongful discharge in violation of public policy under the common law. *See* ER-269–70, ER-272. Dr. Rabin also sued Providence for retaliation under the Law Against Discrimination and common-law wrongful discharge.² ER-270, ER-272. Providence moved to dismiss the claims, arguing it could not be held liable because it works with a staffing company, Mednax, to hire its neonatologists. *See* Dkt. 13 at 9–11. The district court accepted that argument, but this Court reversed. *Kane v. Mednax Servs., Inc.*, 2023 WL 8797505, at *1 (9th Cir. 2023). Even if Mednax were the plaintiffs’ employer, the Court explained, that doesn’t bar Providence from *also* being “held liable as an employer”—and the plaintiffs had alleged just that. *Id.*

On summary judgment, Providence again made the same argument. *See* Dkt. 79 at 2. This time, however, the plaintiffs had amassed not just allegations, but reams of evidence demonstrating Providence’s role in their employment: Providence ultimately decided who could work in its NICU—and who couldn’t—including Ilg. ER-44–45. Providence trained its doctors. ER-51. It required them to abide by extensive rules for treating patients that governed everything from how they should enter medical records to what drugs they may prescribe. ER-75, ER-156–61. And it reviewed their performance. ER-51–53, ER-76, ER-97, ER-100. Providence also had the power to investigate and discipline its NICU doctors. ER-61–62, ER-70–71,

² The plaintiffs also pled negligence claims, but they are not appealing the district court’s ruling on those claims.

ER-109–15, ER-121–22, ER-168. Indeed, Providence holds the neonatologists out as Providence employees—and benefits financially from doing so, securing large donations by touting its NICU staff. ER-55, ER-247, ER-249; *see also Neonatal Intensive Care, supra* at 5. And, for the claims under the Washington Law Against Discrimination, no employment relationship is necessary at all. *See infra* Part II(A).

Nevertheless, the district court again dismissed all the claims for the same reason as before: According to the court, as a matter of law, there was no employment relationship between the hospital and its doctors. ER-13–21. At some points in the opinion, the court seemed to recognize that Providence supervised the doctors’ work and controlled whether a doctor could work at the hospital at all. ER-18 (Providence “had control over aspects of the day-to-day activity.”); ER-21 (Providence “had control over their facilities and enforcement of their policies and procedures.”); ER-25 (recognizing “ability to control ... possible placement”). Nevertheless, the court held that there was not even a dispute of fact as to whether Providence was “controlling parts of the physician’s employment.” ER-24. In a single paragraph, the court also held that, regardless of employment status, the retaliation claims under Washington’s Law Against Discrimination failed. The court believed that Providence had not undertaken any adverse action because it could not be held responsible for Ilg’s retaliatory threats and harassment.

II. Legal background.

“Washington prides itself in a hoary and vigorous public policy protecting employees.” *Reeves v. Mason Cnty.*, 509 P.3d 859, 870 (Wash. Ct. App. 2022). The state has several vehicles for workers to challenge discrimination, harassment, and retaliation. Two are at issue here: (1) a common-law claim for wrongful discharge in violation of public policy; and (2) claims under the Washington Law Against Discrimination for sex discrimination and retaliation. *See* ER-269–70, ER-272.

Wrongful Discharge. In Washington, workers who are constructively discharged in retaliation for reporting misconduct may bring a common-law tort claim for wrongful discharge in violation of public policy. *See Becker v. Cmty. Health Sys., Inc.*, 359 P.3d 746, 748–49 (Wash. 2015). The Washington Supreme Court has not addressed whether an employment relationship is necessary to bring this claim, and if so, what standard applies. However, because wrongful discharge is a common-law claim, lower courts in Washington apply the common-law agency test to determine if an employment relationship exists for the purpose of the claim. *See, e.g., Karstetter v. King Cnty. Corr. Guild*, 516 P.3d 415, 419–20 & n.3 (Wash. Ct. App. 2022).

Washington courts have recognized that, under the common law, multiple companies can jointly employ a worker. *See Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 626 P.2d 30, 32–34 (Wash. Ct. App. 1981). A company is a worker’s common-law employer if the worker’s “conduct in the performance of the service is

subject to the [company’s] right of control.” *Ebling v. Gove’s Cove, Inc.*, 663 P.2d 132, 134 (Wash. Ct. App. 1983); *see also Dep’t of Lab. & Indus. v. Tradesmen Int’l, LLC*, 497 P.3d 353, 362 (Wash. 2021) (explaining joint employers may both be liable if they both “possess substantial control over the workers and the work environment”). The key question is not whether an employer “actual[ly] exercise[d]” control over the employee’s work, but rather whether it had “the right to” do so. *Cassidy v. Peters*, 309 P.2d 767, 770 (Wash. 1957).

In addition to the right of control, Washington courts, like many other jurisdictions, consider factors such as “whether or not the one employed is engaged in a distinct occupation or business,” “the kind of occupation,” “the skill required,” “whether the employer or the work[er] supplies the instrumentalities, tools, and the place of work,” “the length of time for which the person is employed,” “the method of payment, whether by the time or by the job” “whether or not the work is a part of the regular business of the employer,” “whether or not the parties believe they are creating the relation of [employer] and [employee],” and “whether the principal is or is not in business.” *Massey v. Tube Art Display, Inc.*, 551 P.2d 1387, 1390 (Wash. Ct. App. 1976) (citing Restatement (Second) Agency § 220 (1958)); *see Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289, 299 (Wash. 2012) (discussing test); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (identifying similar factors and citing the same section of the Restatement). The focus of the test is on “the actual

nature of the relationship,” “not on corporate forms, titles, labels, or paperwork.” *Dolan v. King Cnty.*, 258 P.3d 20, 28–29 & n.13 (Wash. 2011). Except for the right of control, the other factors need not all be present, and none are conclusive. *Massey*, 551 P.2d at 1390.

Where the relevant facts are “susceptible of more than one interpretation or conclusion,” then it is up to the factfinder to determine whether an employment relationship exists. *Bloedel Timberlands Dev., Inc.*, 626 P.2d at 33. “Usually,” then, the question of whether an employment relationship exists is “for the jury.” *Jackson v. Standard Oil Co. of Cal.*, 505 P.2d 139, 144 (Wash. Ct. App. 1972).

Washington Law Against Discrimination. The Washington Law Against Discrimination aims to “deter and to eradicate discrimination in Washington,” a goal which the Washington Supreme Court has said is “of the highest priority.” *Marquis v. City of Spokane*, 922 P.2d 43, 49 (Wash. 1996). Unlike a wrongful discharge claim, claims under the WLAD need not be predicated on an employment relationship between the plaintiff and the defendant. *See id.* at 50; *Galbraith v. TAPCO Credit Union*, 946 P.2d 1242, 1248–49 (Wash. Ct. App. 1997); Wash. Admin. Code § 162-16-230. The WLAD has two provisions under which individuals may bring workplace discrimination claims. *See Howell v. Dep’t of Soc. & Health Servs.*, 436 P.3d 368, 374 (Wash. Ct. App. 2019). The first, Section 49.60.180, provides that it is an “unfair practice for any employer” to “discriminate against any

person ... because of ... sex.” That provision does require an employer-employee relationship for claims under it to be actionable. Wash. Admin. Code § 162-16-230(1).

But the second provision is different. That provision, Section 49.60.030(1), provides a more expansive “right” for Washingtonians “to be free from discrimination because of ... sex.” That broad right includes “[t]he right to obtain and hold employment without discrimination,” as well as the right of “independent contractor[s] to be free of discrimination ... in the making or performing of a contract.” *Id.* (first quote); *Marquis*, 922 P.2d at 51 (second quote); *see* Wash. Admin. Code § 162-16-230(2) (“[I]ndependent contractor[s]” are “protected by [Section] 49.60.030(1)” which “is enforceable by private lawsuit in court.”); *Howell*, 436 P.3d at 374 (Section 49.60.030(1) “makes no reference to the plaintiff being an employee or the defendant being an employer”).

STANDARD OF REVIEW

This Court reviews a district court’s grant of summary judgment “de novo,” “viewing the evidence in the light most favorable to the non-movant,” the plaintiffs. *Caldrone v. Circle K Stores Inc.*, 156 F.4th 952, 956 (9th Cir. 2025). Summary judgment is only appropriate if, “viewing the evidence in the light most favorable to the nonmoving party” and “drawing all inferences in [their] favor,” there is no “genuine dispute as to any material fact.” *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 440–41 (9th Cir.

2017). If any “reasonable juror” could find in favor of the nonmoving party, then summary judgment is inappropriate. *Id.*

Because the issues in this case arise under Washington law, this Court “approximate[s] state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum.” *Kwan v. SanMedica Int’l*, 854 F.3d 1088, 1093 (9th Cir. 2017). Certification to the Washington Supreme Court is appropriate if there “is no controlling precedent” on the question of law and “the answer to the question is determinative of th[e] appeal.” *Taylor v. Burlington N. R.R. Holdings Inc.*, 904 F.3d 846, 847 (9th Cir. 2018) (citing Wash. Rev. Code § 49.60.040).

SUMMARY OF ARGUMENT

I. The district court’s sole reason for granting summary judgment on the wrongful discharge claim was its belief that Providence could not possibly be its doctors’ employer. But a reasonable juror could easily hold that Providence was at least a joint employer with its staffing company, Mednax.

Most relevant to the common-law employment inquiry is Providence’s ability to control its doctors’ work. And the hospital had the most important form of control: It could prevent a doctor from working there at all. But Providence’s control was not limited to its ability to hire and fire. Providence had the right to train its neonatologists; it could determine which patients the doctors saw, what tasks they

performed, and how they did so; Providence's policies governed its doctors' work; it had the right to supervise and discipline the doctors; and it conducted their performance reviews. That's more than sufficient for a reasonable juror to conclude that Providence was an employer.

If more were needed, other factors, too, support that conclusion. For example, Providence's business depends on its neonatologists. Without the neonatologists, Providence would have no NICU. Thus, unlike, say, a plumber hired for a specific repair, Providence's neonatologists were hired long-term to perform the very work Providence itself provides. Providence also provided the worksite—the hospital—and the tools. Indeed, Providence even held itself out as its neonatologists' employer. A reasonable juror could certainly agree.

In reaching the opposite conclusion the district court discounted and ignored the plaintiffs' evidence and improperly made inferences in Providence's favor. The district court also made a legal error: It seemed to think that Providence couldn't have a right to control the plaintiffs' employment because Mednax may have shared that right. That's wrong. If two companies both have the right to control a worker's employment, both are employers under the common law. *See EEOC v. Global Horizons, Inc.*, 915 F.3d 631, 637 (9th Cir. 2019); *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 723 (9th Cir. 1999). The district court, therefore, was wrong to grant summary judgment to Providence on the wrongful discharge claim.

II. The same is true of its decision to grant summary judgment on the claims under the Washington Law Against Discrimination. Here, too, the court’s ruling was based on its conclusion that no reasonable juror could find an employment relationship between Providence and Drs. Lang and Rabin.

That reasoning fails from the start. No employment relationship is necessary for a worker to bring either a sex discrimination or a retaliation claim under the WLAD. The statute provides Washingtonians an expansive “right” “to be free from discrimination because of ... sex.” Section 49.60.030(1). That right, the Washington Supreme Court has held, applies equally to all workers, regardless of employment status. So too does the statutory right to be free from retaliation by “any employer, employment agency, labor union, *or other person.*” Wash. Rev. Code § 49.60.210(1) (emphasis added). This Court should reverse for that reason alone.

But even if an employment relationship were required, a reasonable juror could find that Providence meets the WLAD’s broad definition of “employer,” which includes “any person acting in the interest of an employer, directly or indirectly.” Wash. Rev. Code § 49.60.040(11). Because a reasonable jury could conclude that Providence is an employer under the common law, it necessarily could conclude that it satisfies the WLAD’s broader definition. And in any event, at the very least, there’s a dispute of fact about whether Providence acted, “directly or indirectly,” “in the interest of an employer.” Again, Providence controlled and supervised the doctors’

day-to-day work; it set the policies that governed that work; it could supervise, investigate, and discipline its doctors; and ultimately, it could fire a neonatologist from the hospital. Under the WLAD, that’s more than enough for a jury to find that Providence was “acting in the interest of an employer.”

In a single paragraph at the end of its discussion of Providence’s employment relationship, the district court briefly suggested that the plaintiffs could not win on the merits of their retaliation claims anyway. The court seemed to believe that the hostile work environment suffered by Drs. Lang and Rabin after reporting Ilg’s discrimination—being yelled at, berated, and explicitly threatened with harm by a man who was known to bring a gun to work—could not, as a matter of law, constitute an adverse employment action. But in the retaliation context, adverse action simply means action that “would have dissuaded a reasonable worker” from making a complaint. *Bittner v. Symetra Nat’l Life Ins. Co.*, 558 P.3d 177, 190 (Wash. Ct. App. 2024). And Washington courts explicitly hold that a hostile work environment counts. The district court was wrong to hold otherwise.

III. Existing precedent is sufficient to demonstrate that the claims here should have gone to a jury. But if this Court has any doubt, it should certify to the Washington Supreme Court. That court has not yet had an opportunity to provide guidance about how to analyze joint employment for purposes of either a common-law wrongful discharge claim or claims under the Washington Law Against

Discrimination. If this Court is going to erect a bar to such claims, it should allow the state's highest court the opportunity to consider the question first.

ARGUMENT

“Washington has a long and proud history of being a pioneer in the protection of employee rights.” *Nwauzor v. The Geo Grp., Inc.*, 540 P.3d 93 (Wash. 2023). Under Washington law, Providence's use of a staffing company to assist it with hiring and human resources does not absolve the hospital of liability for the discrimination, harassment, and retaliation that its doctors suffered working in its NICU. Or, at the very least, a jury must decide that question. This Court should reverse.

I. A reasonable juror could find that Providence was the plaintiffs' common-law employer for the wrongful discharge claim.

The only basis that the district court offered for granting summary judgment on the wrongful discharge claim is that, in its view, no reasonable juror could find that Providence was the plaintiffs' employer. The evidence in the record demonstrates otherwise: While the plaintiffs' employment agreements were with Providence's staffing company, Mednax, Providence itself had the right to control their work at the hospital.

The district court seemed to believe that Providence couldn't be an employer because there was evidence that Mednax, too, was involved in the plaintiffs' employment. But that doesn't mean that Providence *can't* be their employer; it just means that Providence and Mednax could *both* be their employers. *See Tradesmen Int'l*,

LLC, 497 P.3d at 362 (holding that “both the staffing agency and the host employer may be [liable] if they possess substantial control over the workers and the work environment”); *Vizcaino*, 173 F.3d at 723 (explaining that a worker can be both an employee of a staffing agency and a common-law employee of the company where they are staffed); *Global Horizons, Inc.*, 915 F.3d at 637 (holding that staffing company and company where the worker actually worked were joint employers because they “simultaneously share[d] control over the terms and conditions of employment”).

Whether a company is the plaintiff’s employer is ordinarily a question of fact that should be decided by a jury. *Jackson*, 505 P.2d at 144. This case is no different.

A. There is at least a dispute of fact about whether Providence had a sufficient right to control the details of the plaintiffs’ employment.

The most important factor in determining whether Providence is a common-law employer is the right to control. *Dolan*, 258 P.3d at 28. The question is not whether an employer “actual[ly] exercise[d]” control over the employee’s work, but rather whether it had “the right to” do so. *Cassidy*, 309 P.2d at 770. Washington courts focus “on substance” not on “corporate forms, titles, labels, or paperwork.” *Dolan*, 258 P.3d at 28–29.

In determining whether an employer had a right to control an employee’s work, Washington courts weigh whether “the employer retained the right, or had the right under the contract, to control the mode or manner in which the work was

to be done.” *Cassidy*, 309 P.2d at 770. Providence had the right to control the plaintiffs’ work in myriad ways. It controlled the doctors’ daily work: The doctors treated Providence’s patients, Providence assigned their tasks, and they worked in Providence facilities with Providence equipment. Providence also controlled the standards that governed the doctors’ work. It had the right to supervise the doctors’ performance, investigate any misconduct, and discipline doctors. And Providence had the right to hire and fire: It decided who could work at the hospital, and it could fire doctors who did not meet its expectations. Washington courts have held that evidence far less robust than that here is sufficient to at least raise a triable issue for the jury. *See Massey*, 551 P.2d at 1391–92; *Bloedel Timberlands Dev., Inc.*, 626 P.2d at 33–34; *Baxter v. Morningside, Inc.*, 521 P.2d 946, 948–50 (Wash. Ct. App. 1974); *Dolan*, 258 P.3d at 28–29.

1. Providence retained the right to control “the details of the [plaintiffs’] work.” *Massey*, 551 P.2d at 1390. Providence’s doctors treated *Providence’s* patients. ER-38, ER-76. And Providence had the right to tell them how to do so. *See, e.g.*, ER-156–58 (Providence directive governing, among other things, how doctors should conduct rounds, update medical records, prescribe medication, and communicate with patients’ families); ER-75. Providence controlled details as minute as how often the doctors must make progress notes and as crucial as which medications the doctors could prescribe. ER-156–58; *see also* ER-165 (requiring doctors to comply with

Providence’s “current methods for case review, focused and ongoing monitoring, behavior management, and practice improvement”).

Providence also had the right to—and in fact, did—control the standards and policies that governed the plaintiffs’ work. Providence required the plaintiffs to “provide neonatology services in compliance with [Providence’s] Bylaws, Rules and Regulations of the Medical Staff; any directives specific to [the NICU]; applicable Providence Health & Services’ policies”; “the Providence Health & Services Mission and Core Values”; and “The Ethical and Religious Directives for Catholic Health Care Services.” ER-75. Providence also required doctors to abide by its Code of Conduct, which, among other things, “prohibits any retaliation,” “harassment,” and “workplace violence.” Dkt. 92-12 at 9, 20. *See Brant v. Schneider Nat’l, Inc.*, 43 F.4th 656, 666 (7th Cir. 2022) (employer requiring workers to abide by “policies and procedures” suggests employment status); *Covington v. Int’l Ass’n of Approved Basketball Offs.*, 710 F.3d 114, 119 (3d Cir. 2013) (employment relationship where employer required employees to abide by its “rules and regulations”).

The plaintiffs worked at Providence’s NICU, wearing Providence scrubs, using Providence’s equipment, and relying on support staff hired by Providence. ER-46–47, ER-55, ER-76; *see Cassidy*, 309 P.2d at 770 (control where employer provided and controlled the equipment); *Int’l Ass’n of Machinists & Aerospace Workers, Loc. Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp.*, 387 F.3d 1046, 1059 (9th Cir.

2004) (control where employer, not employee, had the power to hire or pay assistants for the employee).

And Providence had the right to require the plaintiffs not only to provide medical care to the hospital's patients, but also to participate in regular meetings to discuss the quality of that care, attend conferences on Providence's behalf, attend trainings by Providence, and "[p]erform" any "other duties" the hospital might request of them. ER-51, ER-75-76, ER-86, ER-180-81; *cf. JustMed, Inc. v. Byce*, 600 F.3d 1118, 1126 (9th Cir. 2010) (right to assign tasks weighs in favor of control).

2. Providence had the power to review, investigate, and discipline its doctors if they were not complying with its policies or meeting its standards. It was Providence's job—not Mednax's—to ensure that the doctors were "taking care of patients in a timely and high-quality way." ER-53-54. Providence conducted annual reviews of the NICU doctors. ER-47-48, ER-97. It had the authority to "develop measurable goals" and "objective standards" for the doctors' "performance and productivity," and to conduct an annual review of the doctors' "delivery of professional services." ER-76. And it regularly exercised that authority. Each year, Providence's Chief Administrative Officer would interview the nurse managers and other providers who worked with the neonatologists, review surveys from parents, and produce a report reviewing the NICU doctors' performance and productivity

for that year. ER-47-48, ER-52, ER-54, ER-132. Providence did not share that report with Mednax. ER-48.

If Providence had concerns about a doctor, it could investigate those concerns and discipline the doctor. *See* ER-54. Providence had “the authority to review all documents and interview all individuals it determines may be relevant to its investigation,” and could “require a physical and/or mental examination of the practitioner.” ER-111. Providence could also issue discipline, ranging from issuing “a letter of guidance, warning, or reprimand,” to “[i]mpos[ing] a requirement for monitoring,” to reducing, suspending, or revoking a doctor’s clinical privileges. ER-112-13. Providence could also place a doctor on a performance improvement plan. ER-54, ER-132; *cf. Int’l Ass’n of Machinists & Aerospace Workers, Local Lodge 964*, 387 F.3d at 1059 (control where company exercised supervision); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014) (employment relationship where employers could oversee and evaluate job performance); *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 227 (5th Cir. 2015) (employment relationship where employer “completed performance reviews” of the work).³

³ Providence began exercising even more control over Dr. Rabin after it approved him to take on a leadership role in the NICU. ER-73; Dkt. 80-5 at 28. Providence required him to submit “monthly time reports” in “the form requested by [Providence].” ER-74-75; *see* ER-42. It required him to provide Providence with “advance written notice of all absences” from work. ER-74. And it paid Mednax, which in turn paid Dr. Rabin, an additional monthly stipend for his extra leadership

3. Finally, Providence had the ultimate control over the plaintiffs’ work at the NICU: It could fire them. *See Stahl v. United States*, 626 F.3d 520, 525–26 (9th Cir. 2010) (control where employer had the power to “discharge [employees] if they cease to perform”). Providence and Mednax jointly agreed on which doctors would work in Providence’s NICU. *See* ER-83. Beyond that, Providence alone had the power to approve or reject additional doctors from working there. ER-75. Without Providence’s approval, a doctor could not work in the NICU. *See id.*

Providence also had the power to fire doctors from its NICU. If Providence no longer wanted a doctor to work in its NICU, the doctor could not work there. ER-168. Mednax could not force Providence to continue employing a doctor that it no longer wanted to employ. *Id.*; *see* ER-75. Providence also had the power to place doctors on leave. ER-70–71, ER-112.

Providence had an additional way of controlling which doctors could work in its NICU. Providence had sole discretion over which doctors would receive “privileges,” the authorization to enter a hospital and treat patients. ER-44–45, ER-57. If Providence chose not to grant a doctor privileges, the doctor would not be permitted to enter Providence’s premises to treat patients in the NICU. ER-57–58.

work. ER-76–77. And Providence extended its insurance coverage for Directors and Officers of the hospital to Dr. Rabin. ER-78.

And Providence also had sole discretion over whether to suspend or revoke privileges. *Id.*

Washington courts routinely find a right to control even with far less evidence. *See, e.g., Cassidy*, 309 P.2d at 770–71 (right to control even where the employer “exercised no direct control or supervision” over the work and only exercised the control “which was practicable under the circumstances”).

B. Weighing the other common-law employment factors, summary judgment was inappropriate.

The evidence in the record demonstrating Providence’s right to control is enough, in and of itself, to send to the jury the question of whether Providence was the plaintiffs’ employer. But other factors also weigh in favor of employment. *See Massey*, 551 P.2d at 1390 (listing factors).

Provision of instrumentalities, tools, and place of work. As explained, Providence, not Mednax or the doctors themselves, provided the “equipment” and “the place where the work was to be done.” *Cassidy*, 309 P.2d at 771 (finding employment relationship where employer provided the equipment and tools); *Smith v. Ludwig*, 132 P.2d 735, 737 (Wash. 1943) (same); *Stahl*, 626 F.3d at 525 (same); *Mitchell v. Frank R. Howard Mem’l Hosp.*, 853 F.2d 762, 766 (9th Cir. 1988) (same in case involving a doctor’s employment at a hospital). The plaintiffs went to work in Providence’s NICU within the Providence Sacred Heart Medical Center. ER-46; ER-75. They wore Providence scrubs in the operating and delivery rooms

and used Providence badges to gain access to the premises. ER-55. Providence provided all of “the space, utilities, supplies and equipment necessary for proper functioning of the NICU.” ER-46.

Providence’s regular business. Next, the plaintiffs “perform functions that are an essential part of [Providence’s] normal operations.” *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 259 (1968). Providence operates “the only Level 4 NICU between Seattle and Minneapolis,” which it touts to donors as providing “the highest level of care for high-risk babies.” ER-249. Providence relies on the neonatologists it hires to provide that care. ER-39. As the district court correctly recognized, the plaintiffs’ “work is part of the regular business” of Providence. ER-20. And though the doctors provide skilled work, because “the occupation is” an “incident of the business establishment of the employer, there is an inference that the [doctor] is an [employee].” Restatement (Second) of Agency § 220, cmt. i.

Distinct occupation or business. The plaintiffs were “not engaged in a distinct occupation or business,” so this factor also weighs in their favor. *Cassidy*, 309 P.2d at 771; *see* ER-76 (contract barring plaintiffs from engaging in “the private practice of medicine” at Providence). This factor differentiates the employment relationship here from cases in which a doctor had their own private practice. *See Henry v. Adventist Health Castle Med. Ctr.*, 970 F.3d 1126, 1131 (9th Cir. 2020) (holding that a weight-loss surgeon was not a hospital employee for purposes of Title VII where

because he had “his own private practice,” treated his own patients at the hospital, spent little time performing work for the hospital and when doing so, was paid by the job). But the plaintiffs here did not operate their own private practices, did not see their own patients, and worked long hours at Providence as part of Providence’s regular business. *See* ER-76, ER-172–73; ER-264 (Dr. Lang spent 100% of her working time at Providence). That the plaintiffs only “treat[ed] Hospital patients” and could not “use[] the Hospital’s facilities to treat [their] own patients,” strongly suggests Providence was their employer. *Mitchell*, 853 F.2d at 766–67.

Length of employment & method of payment. Both the length of time for which the person is employed and the method of payment support an employment relationship between Providence and the plaintiffs. *See Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1104–05 (9th Cir. 2014) (finding employment relationship where workers were paid “a regular rate of pay”). Courts are less likely to find an employment relationship where “the time of employment is short,” or “payment is to be made by the job.” *Cassidy*, 309 P.2d at 771; *accord JustMed, Inc.*, 600 F.3d at 1127 (where a worker is paid “regular[ly], instead of “upon completion of a specific job,” this factor “weighs heavily” in the worker’s favor). Here, Providence did not hire the doctors on a job-by-job or day-by-day basis, but instead for “a term of two years,” which it then renewed several times. ER-78, ER-84. And though Providence paid Mednax, which in turn paid the plaintiffs, Providence paid an annual rate,

unconnected to the number of patients they treated, or the procedures performed during a particular shift. *See* ER-77 (setting annual salary).

Belief of the parties. The belief of the parties, taken in the light most favorable to plaintiffs, also demonstrates an employment relationship. *Ebling*, 663 P.2d at 134 (employment relationship where employee and employer believed the employer had right to control). Dr. Lang and Dr. Rabin testified that they viewed both Providence and Mednax as their employers. ER-178, ER-229–30. And Providence repeatedly held out its neonatologists as its employees. In their fundraising materials, Providence praised the neonatologists, touting their “team of experienced caregivers.” ER-249. Providence also listed the plaintiffs on their website. ER-55. And Providence did not inform families seeking care in the NICU that the doctors treating their infants were independent contractors, not hospital employees. *Id.*

* * *

Washington courts—and others—have consistently held that a jury could find an employment relationship in cases with far less evidence than that here. *See Langness v. Ketonen*, 255 P.2d 551, 554 (Wash. 1953) (holding employer’s control over the location of work and that employer benefited from employee’s work was enough for a juror to infer an employment relationship); *JustMed, Inc.*, 600 F.3d at 1126–28 (employment relationship even where company “did not exercise much control over the manner

and means” by which employee did his work); *Bloedel Timberlands Dev., Inc.*, 626 P.2d at 675 (employment relationship where level of supervision was disputed). This Court should do the same.

C. The district court was wrong to grant summary judgment on employment status.

Despite the evidence in the record, the district court concluded that Providence’s neonatologists were not its employees because it believed that the hospital “did not directly control” its doctors’ work. ER-16. That’s wrong on both the facts and the law.

1. On the facts, the district court itself cited evidence of Providence’s right to control its doctors’ work. The court recognized that Providence could control the doctors’ “day-to-day activity and facilities”; that it could “enforce compliance with [its] code of conduct and policies”; and that Providence’s Chief Administrative Officer oversaw the NICU. ER-18–19.⁴ The court’s conclusion that Providence lacked control thus cannot be squared with its own opinion.

⁴ The district court suggested that the requirement that Providence’s doctors comply with its policies didn’t count as control because the contract required them to do so. ER-18. In doing so, the court seems to have confused control over the “*result*” of the work—which doesn’t indicate an employment relationship—with control over the “*manner or means*” by which the work is done, which does. *See Cassidy*, 309 P.2d at 769 (emphasis added). Providence’s policies governing how the doctors perform their work and behave at the hospital evidence control over the way in which they perform their work.

Beyond overlooking the evidence its own opinion cited, the court also misread the record. For example, the court stated as undisputed fact that Mednax alone “controlled [the plaintiffs’] placement in a facility, their contracts, and their ability to work as a sole provider.” ER-18. But that isn’t what the record shows. It’s undisputed that Mednax and Providence jointly decided which doctors would be staffed at Providence, and *Providence* had the sole authority over which doctors would get privileges to work there. ER-83, ER-44–45. Mednax and Providence *together* negotiated the contract that governed the relationship between the doctors and Providence. *See* ER-73–83. And it was that contract—signed by both Mednax *and* Providence—that provided that doctors could not engage in “the private practice of medicine” at Providence. ER-76. At the least, Providence and Mednax exercised equal control over each of these terms and conditions of the plaintiffs’ employment. *Cf. Global Horizons, Inc.*, 915 F.3d at 637. And, as explained above, a reasonable juror could find Providence *also* had the right to control the doctors’ day-to-day work, to supervise their conduct, and to discipline them. *See supra* Part I(A).

In addition to overlooking evidence of employment, the district court discounted the evidence it did identify—drawing inferences in favor of Providence, rather than the plaintiffs. For example, the court disregarded Providence’s right to remove doctors from its NICU, saying that Providence “likely did not have the direct ability to fire physicians.” ER-17. As an initial matter, even if this description of the

evidence was accurate—that Providence “*likely*” lacked the ability to remove physicians from its hospital—that would only demonstrate that the record does not place this question beyond dispute, so it should go to a jury. But the court’s assertion about what the record shows also cannot be squared with that record, especially when taken in the light most favorable to the plaintiffs. Dr. Lang testified that Providence “could decide if they wanted a physician [to work] there or not.” ER-168. And Providence had sole discretion over a doctor’s privileges to practice at the hospital; revoking a doctor’s privileges not only prevents them from practicing medicine at the hospital, it ordinarily prevents them from being on hospital property. ER-57–58.

The court also seemed to believe it didn’t matter if Providence could fire its doctors from its hospital because Mednax might (or might not) still have been able to offer that physician to a different hospital looking to hire a neonatologist. *See* ER-17. But the relevant question isn’t whether Providence can fire doctors from *any* job. It’s whether Providence could fire *its* doctors from their job *at Providence*. *See Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 216 (3d Cir. 2015) (emphasizing that although store could not fire employee from staffing company, the store had “ultimate control” over whether employee “was permitted to work at its store”). The record, construed in the light most favorable to the plaintiffs, supports the conclusion that it could.

The opinion is replete with similar examples of the district court misapplying the summary judgment standard. The district court discounted the importance of Providence’s policies and directives directing the plaintiffs’ provision of health care, deciding for itself that those directives were merely necessary to “ensure [the plaintiffs’] skills are used safely” and not evidence of control. ER-19. Here again, the district court made that inference in favor of Providence. Even if it was true that directives for patient safety are not proof of control, there was no evidence in the record—let alone undisputed evidence—that Providence’s policies were all in place solely for patient safety. And indeed, several of the directives went beyond that, exercising control over how the plaintiffs practiced medicine. For example, Providence required its doctors to prescribe medications from its preapproved “formulary,” a list of medications that would be “affordable” for the hospital. ER-158. And though it does not represent the universal standard of care, Providence required its doctors to practice medicine in accordance with the Ethical and Religious Directives for Catholic Health Care Services. ER-93. The district court improperly inferred in Providence’s favor that Providence’s policies went no further than necessary to protect patient safety.

The district court also construed the evidence in the light most favorable to Providence when weighing whether the parties believed they had created an employment relationship. The court said, “[Providence] states that they believe they

did not create [an employment] relationship, whereas Plaintiffs state that they believed they were.” ER-21. That is a classic dispute of fact. And instead of resolving the ambiguity in the plaintiffs’ favor, as the court must at summary judgment, the court concluded that the factor weighed in favor of Providence. *See id.*

2. In addition to a raft of factual errors, the district court’s decision also rested on a mistaken legal assumption. Over and over again, the court held that Providence couldn’t possibly have a right to control the plaintiffs’ employment because Mednax had that right. Putting aside the court’s construction of the record, that’s wrong as a matter of law. If two companies share “control” of “the terms and conditions of employment,” the result is not that neither is an employer; it’s that both are. *Global Horizons, Inc.*, 915 F.3d at 637; *see Vizcaino*, 173 F.3d at 723; *Tradesmen Int’l, LLC*, 497 P.3d at 362.

II. The district court erred in granting summary judgment on the Washington Law Against Discrimination claims.

Washington courts have repeatedly emphasized that the Washington Law Against Discrimination “must be given liberal construction.” *Jim Zhu v. N. Cent. Educ. Serv. Dist.—ESD 171*, 404 P.3d 504, 508 (Wash. 2017); *see Wash. Rev. Code* § 49.60.020. The statute’s antidiscrimination mandate is “a policy of the highest priority” in Washington. *Marquis*, 922 P.2d at 49.

The plaintiffs here brought two types of claims under the Washington Law of Discrimination. Dr. Lang brought a sex discrimination claim. And both Dr. Lang

and Dr. Rabin brought retaliation claims. The district court granted summary judgment on those claims because, it held, the plaintiffs had not proved an employment relationship with Providence. But Washington courts and the Washington Human Rights Commission, which interprets the WLAD, have repeatedly affirmed that not all WLAD claims require an employment relationship to be cognizable. And the plaintiffs' claims are among those that do not require an employment relationship.

Even if an employment relationship was required, Providence is the plaintiffs' employer under the WLAD's expanded definition of "employer," which includes not just common-law employers but also "any person acting in the interest of an employer, directly or indirectly." Wash. Rev. Code § 49.60.040(11).

A. The plaintiffs' WLAD claims do not require an employment relationship.

Washington courts and the Washington Human Rights Commission have repeatedly determined that an employment relationship is not necessary for plaintiffs to maintain either sex discrimination or retaliation claims under the WLAD. *See Marquis*, 922 P.2d at 50; *Galbraith*, 946 P.2d at 1248–49; Wash. Admin. Code § 162-16-230. The district court erred in holding otherwise.

1. Start with the sex discrimination claim. The WLAD has two provisions under which individuals may bring workplace discrimination claims. *See Howell*, 436 P.3d at 374. The first, Section 49.60.180, provides that it is an "unfair practice for any

employer” to “discriminate against any person ... because of ... sex.” That provision, by its terms, protects “employee[s]” from “unfair practices in employment” committed by employers. Wash. Admin. Code § 162-16-230(1). So “employee[s]”—but not “independent contractor[s]”—are “entitled to the protection” of that provision. *Id.*

The second provision, Section 49.60.030(1), provides a more expansive “right” for Washingtonians “to be free from discrimination because of ... sex.” That provision “makes no reference to the plaintiff being an employee or the defendant being an employer.” *Howell*, 436 P.3d at 374. This broad right to be free from discrimination thus includes “[t]he right to obtain and hold employment without discrimination.” Wash. Rev. Code § 49.60.030(1). And it also includes “the civil right of independent contractors to be free of unlawful discrimination in the making and performance of contracts.” *Marquis*, 922 P.2d at 51; *accord* Wash. Admin. Code § 162-16-230(2) (“[I]ndependent contractor[s]” are “protected by [Section] 49.60.030(1)” which “is enforceable by private lawsuit in court.”).

Washington courts have repeatedly reiterated this rule, affirming that plaintiffs need not “establish[]” an “employer” relationship “in order to assert a claim” under this provision. *Howell*, 436 P.3d at 375; *Marquis*, 922 P.2d at 50–51; *Galbraith*, 946 P.2d at 1248 (“WLAD is not like federal Title VII, WLAD is not limited to employment discrimination but rather guarantees the right to be free of discrimination in

non-employment settings as well.”); see *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1313–14 (9th Cir. 1998) (this Court acknowledging the Washington Supreme Court has interpreted Section 49.60.030 “as not limited to employees”).

Because “claim[s] of sex discrimination” are cognizable under the WLAD, regardless of whether an employer-employee relationship exists, Dr. Lang’s discrimination claim can proceed regardless of whether she’s Providence’s employee. *Marquis*, 922 P.2d at 51.

2. Likewise, Dr. Lang and Dr. Rabin’s retaliation claims do not depend on the existence of an employment relationship. The WLAD’s retaliation provision, Section 49.60.210(1), says that it is “an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden” by the WLAD. Wash. Rev. Code § 49.60.210(1) (emphasis added). “[T]he plain language of the statute” does not require an “employment relationship” to sustain a retaliation claim. *Galbraith*, 946 P.2d at 1248. Indeed, Washington courts have long held that “[t]he broad language” of the WLAD’s retaliation provision “supports the conclusion that the WLAD does not limit claims to those brought by employees against employers.” *Currier v. Northland Servs., Inc.*, 332 P.3d 1006, 1012 (Wash. Ct. App. 2014); see *Galbraith*, 946 P.2d at 1248–49; *Jim Zhu*, 404 P.3d at 508.

Applying this rule, Washington courts have permitted retaliation claims to proceed absent an employment relationship in a range of scenarios. *Currier*, 332 P.3d at 1009–10 (retaliation claim brought by independent contractor against trucking company after contractor reported racist comments made by another independent contractor); *Galbraith*, 946 P.2d at 1244–45 (retaliation claim brought against credit union by credit union member who assisted credit union’s employees with their discrimination lawsuit); *Fin Zhu*, 404 P.3d at 506 (retaliation claim brought against prospective employer). For the retaliation claims too, the district court erred in requiring the plaintiffs to demonstrate an employment relationship between them and Providence.

B. In any case, Providence is the plaintiffs’ employer under the WLAD’s broad definition of “employer.”

1. Even if an employment relationship was required, the plaintiffs have provided sufficient evidence from which a reasonable juror could conclude that Providence was their employer under the WLAD. The WLAD defines “employer” more expansively than the common law: An employer “includes any person acting in the interest of an employer, directly or indirectly.” Wash. Rev. Code § 49.60.040(11). Because the term is not further defined, Washington courts “presume the legislature intended the word to mean what it did at common law, as [modified] by the statute.” *Marquis*, 922 P.2d at 50. So “employer” under the WLAD, incorporates the common-law meaning of “employer,” and enlarges that definition

to include other persons “acting in the interest of an employer, directly or indirectly.” Wash. Rev. Code § 49.60.040(11). In cases where a business uses a staffing company to hire their employees, courts applying that definition of “employer” regularly hold that both the business and the staffing company are employers. *See Barfield v. N.Y. City Health and Hosps. Corp.*, 537 F.3d 132, 140–41, 150 (2d Cir. 2008) (holding, under the FLSA’s similar definition of “employer,” that nurse directly employed by staffing agencies was also employed by the hospital where she worked); *Grace v. USCAR*, 521 F.3d 655, 665–67 (6th Cir. 2008) (holding, under the FMLA’s similar definition of “employer,” that IT was jointly employed by staffing company and business where she worked).

Washington courts have held that a defendant “act[s] in the interest of an employer” even on a much more tenuous employment connection. *See, e.g., Arroyo v. Pac. Maritime Ass’n*, 529 P.3d 1, 11 (Wash. Ct. App. 2023); *Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921, 926 (Wash. 2001). In *Arroyo v. Pacific Maritime Association*, for example, the Washington Court of Appeals held that a labor union “act[ed] in the interest of an employer” when it dispatched workers for longshore (cargo-loading) jobs. *Id.* at 11. The union was “not the longshore workers’ employer in the traditional sense.” *Id.* But in providing a centralized hiring system for longshore workers, the court held, the union acted “in the interest of an employer.” *Id.*

Providence not only acts in the interest of an employer. As explained above, a reasonable juror could find that it *was* the plaintiffs’ employer. *See supra* Part I. But even if it weren’t, it certainly acted in the interest of one. Again, Providence controlled and “supervis[ed]” the plaintiffs’ “day-to-day work.” *Grace*, 521 F.3d at 667; *see* ER-75, ER-156–58. Providence had the power to “hire and fire” the doctors, who Mednax “referred to work on hospital premises.” *Barfield*, 537 F.3d at 144; *see* ER-75, ER-83. The doctors could report misconduct to Providence’s Chief Administrative Officer, and Providence had the power to investigate, discipline, and even remove doctors from practicing at the hospital. *See* ER-54, ER-111–13. The significant evidence of Providence’s control over the doctors is, at the least, sufficient to create a genuine dispute of fact as to whether Providence was the plaintiffs’ employer under the WLAD. This Court should reverse.⁵

2. At the end of the district court’s discussion of employment under the WLAD, almost as an aside, the court held that the plaintiffs’ retaliation claims would also fail for lack of an adverse employment action. In the retaliation context, an

⁵ To the extent the district court believed that *Ilg*’s employment status mattered, that’s wrong. *See* ER-24–25. Providence is liable for *Ilg*’s conduct under Washington law—regardless of whether it was his employer—because the hospital “knew[] or should have known of the harassment” and “failed to take reasonably prompt and adequate corrective action.” *LaRose v. King Cnty.*, 437 P.3d 701, 714 (Wash. 2019); *see* ER-33, ER-170–71, ER-177, ER-187–88, ER-193–94, ER-210–12, ER-228, ER 238–40. And in any event, *Ilg* was subject to the same control as the other Providence doctors, so a reasonable juror could find that Providence was a joint employer of *Ilg* too. *See supra* Part I.

adverse action is simply an action that “would have dissuaded a reasonable worker” from making a complaint. *Bittner*, 558 P.3d at 190. Washington courts explicitly hold that a hostile work environment counts as an adverse action. *See, e.g., id.*; *Romulo v. Seattle Pub. Utils.*, 2022 WL 17246817, at *11 (Wash. Ct. App. 2022); *Alonso v. Qwest Commc’ns Co.*, 315 P.3d 610, 617 (Wash. Ct. App. 2013); *see also Ray v. Henderson*, 217 F.3d 1234, 1244–45 (9th Cir. 2000). Here, a reasonable juror could find that Ilg’s behavior—yelling, berating, expressly threatening the plaintiffs with harm, and carrying a gun in the hospital—and Providence’s failure to address that behavior, were enough to dissuade a reasonable worker from making a complaint. The district court was wrong to hold otherwise.

III. In the alternative, this Court should certify to the Washington Supreme Court.

If this Court has any doubt, it should certify to the Washington Supreme Court. *See, e.g., Taylor*, 904 F.3d at 853 (certifying a question about the WLAD’s scope to the Washington Supreme Court and recognizing that employee protection under the WLAD often “exceed[s]” federal protection). The Washington Supreme Court has not yet had an opportunity to provide guidance about how to analyze joint employment for purposes of either a common-law wrongful discharge claim or claims under the Washington Law Against Discrimination. And these issues are likely to recur as more and more companies turn to staffing agencies to find workers. *See Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 410 (4th Cir. 2015).

Certification is appropriate where there is no “controlling precedent” from the Washington Supreme Court and “the answer to [a certified] question is determinative of [an] appeal.” *Taylor*, 904 F.3d at 847 (citing Wash. Rev. Code § 49.60.040); *see also Nwauzor*, 540 P.3d at 98 (emphasizing Washington’s “proud history” of protecting “employee rights”). And it is “particularly appropriate” where “the issues of law” have “significant policy implications.” *Barlow v. Washington*, 38 F.4th 62, 66–67 (9th Cir. 2022). Under virtually any standard, the plaintiffs’ claims here should have gone to the jury. But if this Court disagrees, it should certify to the Washington Supreme Court the questions of how to analyze joint employment relationships for the purposes of wrongful discharge and, if an employment relationship is necessary at all, WLAD claims.

CONCLUSION

This Court should reverse, or in the alternative, certify to the Washington Supreme Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 10,334 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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